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IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Marine Hardware Company, a Corporation,
Libellant,

vs.

Gasoline Launch "Mountaineer,"
Respondent,

Halfhill Packing Corporation, a Corporation,
Intervener.

APPELLEE'S REPLY BRIEF.

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The case at bar involves the furnishing of equipment consisting of a purse seine to a new purse seine fishing vessel to complete the original equipment of the vessel and bring her into condition to function as intended. It must be borne in mind that a purse seine fishing vessel has to be specially constructed in order to enable her to use a purse seine, and that a purse seine is an essential part of the equipment necessary to fit a purse seine vessel for the use intended; and unless equipped with a purse seine such a vessel is of no value as a purse seine fishing vessel and practically useless for any other purpose.

The vessel "Mountaineer" was a specially constructed purse seine fishing vessel built by Barbara Bros. at Tacoma, Washington, under agreement with Halfhill Packing Corporation, a company engaged in packing tuna fish, but was purchased direct from Barbara Bros. by one Mariana [Tr. p. 92] to be used, and she was actually used by him in purse seine fishing. She was, immediately upon launching, brought to San Pedro, where the balance of her necessary equipment, a purse seine, was furnished by the Marine Hardware Company.

The testimony of Mariana [Tr. pp. 92-99] shows conclusively and appellants do not attempt to rebut this, that the purse seine constituted a part of the original equipment of the vessel and that it was an essential part of the equipment which said vessel required to enable her to function as intended, that is, as a purse seine fishing vessel.

Counsel seem to be under the impression that the original equipment furnished to this vessel constitutes a maritime lien, but we think that the distinction is clearly pointed out in the case of The United Shores, 193 Fed. 553 at page 554. The court, after holding certain materials furnished to a vessel constituted original equipment for which no maritime lien existed, says:

> "The libellants, however, contend that the maritime lien law passed June 23, 1910, modifies and changes the rule of law to which we have referred. By section 1 it is substantially provided

> that any person furnishing repairs, supplies, or other necessaries to a vessel, whether foreign or domestic, upon the order of the owner, shall have a maritime lien, which may be enforced by a proceeding *in rem*. But in my opinion Congress, by this provision, did not intend to give to this court, sitting in admiralty, jurisdiction of a subject which is not solely of maritime origin. There is nothing contained in the act to lead one to think that Congress intended to change the law that a vessel is completed only when she is fully equipped to engage in navigation and commerce; and it is thought that the terms 'supplies' and 'other necessaries' refer to fuel and such furnishings generally as are of use after a vessel is completed and fit to proceed on a trip or voyage."

Counsel make a statement (appellant's brief, p. 7) that the Marine Hardware Company did not know that the vessel had never fished before, but they utterly failed to introduce testimony to that effect, nor would it have been material had they done so.

Counsel further insinuates that a purse seine vessel is the same as any other fishing vessel with certain accessories attached. But counsel well know that the construction is entirely different in that the hull itself is built with a specially broad, flat, stern to hold the weight of the net, that the bulwarks are entirely different and that also a different and peculiar winch is installed, and a large turntable on the stern platform built to handle the net. [Tr. p. 98.] (Appellant's Brief, p. 7.)

The fact that the vessel at the time she left Tacoma was capable of navigating the sea is not the important fact. The important and controlling fact is that she was not as yet completely equipped for the purpose for which she was intended and specially constructed. It was impossible to use said vessel for the purpose for which she was designed and intended without a purse seine, nor was she equipped with an article absolutely essential to enable her to navigate and function as intended prior to being furnished with the purse seine, as shown by Mariana's testimony. [Tr. pp. 92-99.]

Appellant apparently relies upon the District Court case of Hiram R. Dixon, 33 Fed. 297, decided in 1887. (Italics ours.) We wish to call attention to the fact that the vessel was not a purse seine fishing vessel. The facts fail to show that the steamer was anything other than an ordinary trading steamer, or that she was built or specially designed or constructed for the sole purpose of fishing. Therefore the net was not an essential part of her original equipment, but was furnished, as stated by the court, as part of her outfit for a *particular voyage*.

Throughout this case the District Court recognizes the doctrine that articles furnished as part of the original construction and equipment of a vessel do not give rise to maritime liens, and it states clearly and emphatically that (p. 298) "In this case, the sole object of the contract sued upon was to enable this vessel to make a *contemplated fishing voyage*." And again, (p. 299) "The nets were to be used on a *then contem-*

plated voyage, and the sole object of the contract sued upon was to enable *that voyage* to be performed." There is nothing said in this case, which, even by implication, can be construed as deciding that the furnishing of a particular kind of net to a vessel specially designed and built for fishing with such a net, and without which her original equipment would not have been complete, and without which she would have been unable to function, would give rise to a maritime lien. This question was not before the court in that case, and therefore it is in no way decisive of the point involved in this appeal. The only statement in that case which might be taken as implying that a contract to furnish nets is always maritime in its nature, is the statement (p. 300) "That fishing instruments are not to be deemed a part of the ship appeared as long ago as the laws of Oleron and the preceding question "Are the furnishers of harpoons and lines to a whaler before she is launched, builders of a ship?" When it is considered that the distinction drawn by our courts between construction contracts and contracts for supplies after construction, is exclusively a distinction enunciated by the courts of the United States, and is not to be found in any other jurisdiction so far as we are aware, it is obvious that the laws of Oleron can not be taken as authority. As to the reference to whalers, these vessels are always large sea going cargo boats, useful and often used for various purposes other than whaling. There is nothing special about the design or construction of the hull of a whaler, which renders it adapted only to whaling. When a vessel is

to be put in the whaling trade certain special appliances are put aboard, such as boiling vats, guns, harpoons, etc. And though she may be built with the intention of putting her in the whaling trade, her whaling paraphernalia are mere superficial accessories, and when these are removed she can be used as a freighter, sealer, or for many other purposes. There is a vast distinction btween this and the case of a vessel *specially* constructed as to hull, winches, etc., for a particular business. Would it, for instance, be said that the cables, cutter, suction pumps and other paraphernalia necessary to originally equip a vessel designed and built as a seagoing suction dredge, and without which she cannot operate as a dredge, are not part of her original construction even though without this paraphernalia she may be able to go to sea and navigate?

The Jack-o-Lantern, 42 Supreme Court Reporter, 243, cited by appellant is not in point, as the facts consist of the conversion of a car barge into a pleasure ferry which the court held constituted the rebuilding of an old vessel and was a maritime contract.

Appellant cites The Dredge A. 217 Fed., 617. (Italics ours.)

This was a case where an old hull was reconstructed into a suction dredge at Philadelphia, Pa., and towed to Beaufort, North Carolina, for dredging purposes. During its construction various parties furnished equipment necessary for her operation as a dredge, also various other parties furnished materials while said dredge was in operation at Beaufort.

The court (p. 621) divided the various claims in two general classes (1) Those originating while said dredge was under construction between Dec. 10, 1910 and May 11, 1911, (2) Those originating *while said dredge was operating at Beaufort, North Carolina.*

The court (p. 635) clearly points out that the claims originating after May 11, 1911, were for necessaries, being for materials, supplies and repairs furnished after the dredge was completed and *while actually engaged in the work for which it was constructed.*

The court (p. 636) said that all claims originating prior to May 11, 1911, constituted a part of the original construction and equipment of the dredge and therefore were not maritime liens. That the claims for materials furnished *while she was engaged in the work of dredging* for repairs and necessary supplies constituted maritime liens.

Counsel make the statement (App. brief p. 20) that the court specifically finds that the materials and supplies furnished after May 11, 1911, "were necessary and essential to enable the boat to begin and continue the operation of its dredging."

We fail to find any such statement made by the court. However, the special master in referring to the claim of Hancock in the first part of his finding makes such statement. We think the word "begin" in the quoted portion of the master's finding is obviously carelessly and unintentionally used as it is not consistent with the balance of the finding. This finding occurs at p. 634 and is finding "No. 13." In the first

sentence of the finding the master states that the claim is for "supplies and cash furnished for the payment of supplies for the protection and preservation of Dredge A *while engaged in dredging* at the port of Beaufort, North Carolina. The master then states what the supplies and payments were for, and it is apparent that they were all for articles and seamen's wages furnished and paid during the dredging operations. And immediately following the sentence in which he says that the amounts and items so advanced were necessary and essential to enable the boat to begin and continue the operation of its dredging, he states:

> "At the time of the original furnishing of said amounts, said dredge was in a condition wherein it was necessary to have and maintain a sufficient crew to operate the machinery on said boat in order to keep the said boat from accumulating bilge water and to protect and preserve the same, that it might *continue* the contract of dredging * * *. Without the item so furnished by libellant Mitchell (the owner of the dredge) could not have *continued its operation.*"

Our conclusion that the word "begin" was carelessly used is borne out by the decision of the court in referance to these supplies. The court said (p. 635)

> "The foregoing claims are clearly for necessaries, being for materials, supplies and repairs. They were furnished *after* the dredge was complete, and, while *actually engaged in the work* for which it was constructed."

We think the balance of appellant's brief is fully answered by the following authorities.

In Benedict on Admiralty, 4th Edition, section 183, we find the following:

> "Not only the building of the hull but the supplying of the original equipment of the vessel is held to be outside of the admiralty jurisdiction on the theory that the vessel is not 'built' until completed for the purpose designed and whatever is supplied to such a vessel for the purpose of making her what she is intended to be in part of her 'building.'"

* * * * * * * *

The Isosco, Case No. 7060, 13 Fed. Cases, 89.

A hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where the materials and work for which the libel was filed were done. The court said (Italics ours):

> "What libellants did and furnished were clearly by way of completing the construction of the vessel, and constituted in no sense within the meaning of the maritime law repairs and materials and for which by that law an action in rem will lie. It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is done after she has been put in the water. * * * *The vessel was not so far completed at the time as to enable her to discharge the functions for which she was intended.*"

The Count De Lesseps, 17 Fed. 460. (1883 Dist. Ct. E. D. of Pa.)

This was a libel for labor and materials consisting of a derrick, buckets and other paraphernalia furnished at Philadelphia after the vessel had been towed from New Jersey, where she had been built, to fit out the vessel for an intended voyage to Panama. It was contended by the respondent that the same were furnished in the original construction of the vessel and were necessary to equip her for canal dredging; that the vessel was not useful for any other purpose. The libellants contended on the other hand that the vessel was capable of carrying any cargo, and prior to the work was towed from New Jersey to Pennsylvania having a completed outfit and machinery, and that when it appeared that further machinery was desirable, the contract was made with libellants to furnish the materials not contemplated by the original design.

The court said:

> "All the materials and work were completed as necessary to complete the structure from the beginning. What the libellants did should be held to have been done in the original construction of the vessel. * * * The question involved has been so fully considered in cases undistinguishable from this that further discussion would serve no useful purpose. See Ferry Co. v. Beers, 20 How. 393; Roach v. Chapman, 22 How. 129; Edwards v. Elliott, 21 Wall. 532; The Ship Norway, 3 Ben. 163; Scull v. Shakespear, 25 P. F. Smith, 297; Morewood v. Enequist, 23 How. 494; The Pacific, 9 Fed. Rep. 120."

* * * * * * * *

In re Glenmont, (District Court of Minnesota), 32 Fed. 703.

The facts were these: A month after the hull of the steamboat was built and the propelling power put in, libellant furnished her with stores, fuel, tiller line, check line, copper wire, packing for machinery, pails for roof, beds and bedding, etc. On the day this outfit was received, the boat made her first trip. The original contract did not include said materials and outfit. It was held that the original construction of the boat contemplated all the materials furnished to make the vessel serviceable from the beginning, and that no maritime lien existed. The court said (Italics ours):

> "The question presented for determination, and the only one, in my opinion, is whether the materials furnished are a part of the original construction to complete the structure, *and make it a vessel serviceable for the navigation contemplated,* or was the steamboat entirely complete and adapted for the intended use at the time the materials were furnished by the libellants.
>
> I cannot doubt that *the materials furnished were necessary, according to the original design, and the steamboat would not be suitable for the navigation intended without the tiller-rope, check-line, bedding etc.,* included in the libellants' bill of items. *The original construction of the boat contemplated all the materials furnished to make the vessel serviceable from the beginning, and no maritime lien exists.* The question presented was settled in Ferry Co. v. Beers, 20 How. 393; Edwards v. Elliott, 21 Wall. 532; Roach v. Chapman, 22 How.

129; Morehead v. Enequist, 23 How. 494. See the Pacific, 9 Fed. Rep. 120; The Norway, 3 Ben. 163; The Count de Lesseps, 17 Fed. Rep. 460. The Eliza Ladd, 3 Sawy. 519, is not in harmony with the above cases.

The libel is dismissed with costs, and a decree so ordered."

This case was affirmed by the Circuit Court of Appeals in 34 Fed. 402. The court say (Italics ours):

"The district judge dismissed the libel, on the ground that the materials furnished were part of the original construction, and necessary to complete the vessel and make it serviceable for navigation; holding that because of this fact no maritime lien existed, citing: Ferry Co. v. Beers, 20 How. 393; Roach v. Chapman, 22 How. 129; Morewood v. Enequist, 23 How. 494; Edwards v. Elliot, 21 Wall. 532; The Pacific, 9 Fed. Rep. 120; The Count de Lesseps, 17 Fed. Rep. 460; The Norway, 3 Ben. 163. Of the correctness of the general proposition that no maritime lien exists on a contract for building a vessel, or for furnishing materials for such building, or the supply of machinery for the original construction, or work done thereon, there can be no doubt. The cases cited abundantly establish that; and I think it clear from the testimony that a portion of the articles for which this libel was filed came within that rule. It may be doubted whether that is true of all or whether some of the articles were not rather supplies furnished to the vessel *after its completion, and while it was engaged in navigating the Mississippi.* Still, I think the decree of the Dis-

trict Court dismissing the libel *in toto* was right, for one, if not more, reasons." (34 Fed. 403.)

* * * * * * * *

In re The Paradox (District Court S. D. N. Y.) 61 Fed. 861.

The Paradox was a yacht designed and built for the purpose of experimenting with a system of water-jet propulsion. The libellant and its immediate predecessor contracted to put in the propelling machinery. The court said (italics ours):

"The evidence leaves no doubt that all the machinery was contracted for and supplied for the purpose of completing the construction of the vessel as an experimental yacht, in accordance with the original design. The libellant's officers understood this from the beginning. After the hull, constructed by other persons, was sufficiently advanced, it was launched, towed to the libellant's yard, and the machinery there put in by the libellant company, and by the preceding company, with changes of detail from time to time in the course of construction so as to make the machinery as efficient as possible.

In the case of The General Cass, 1 Brown, Adm. 334, Fed. Cas. No. 5,307, Longyear, J., says:

'The true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, *is the business or employment for which it is intended,* or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity or means of propulsion.'

"When the vessel is completed for the purpose intended, then the vessel is 'built,' and not till then, whether it be a steamer, a sailing vessel, a barge, a scow, or a mere float designed to support and transport a bath house (The Public Bath No. 13, 61 Fed. 692); *and whatever is supplied to such a vessel for the purpose of making it what it was intended to be, and to enable it to enter upon the kind of business or navigation intended, is a part of the 'building' of the vessel. This is the clear weight of authority.* The case seems to me to be entirely within the decisions of Roach v. Chapman, 22 How. 129; *in re* Glenmont, 32 Fed. 703; The Pioneer, 30 Fed. 206; The Isosco, 1 Brown, Adm. 495, Fed. Cas. No. 7,060; Wilson v. Lawrence, 82 N. Y. 409; *in which cases all the suggestions and arguments of the libellants seem to me to be met and overruled.*

"I much regret the necessity of this conclusion in the present case; but it seems unavoidable upon the authorities, and I must, therefore, dismiss the libel, though without costs, as not based upon a maritime contract, and hence not within the jurisdiction of this court." (61 Fed. 861.)

* * * * * * * *

McMaster v. One Dredge (Dist. Ct. Ore. 1899), 95 Fed. 832.

The libel was for materials and labor in converting a scow into a dredge. The scow had never been used as a dredge. The machinery upon which the repairs mentioned were made and the furnishings provided had never been on the scow, but were a necessary part

of the equipment and appliances required for her conversion into a dredge.

The court, after reviewing the Isosco, The Pacific, 9 Fed. 120, The Count de Lesseps, and The Paradox, said (italics ours):

> "The case of The Paradox, 61 Fed. 860, is similar to the case last cited. Here it is held that a contract for the machinery of a vessel is not enforceable in admiralty, where such machinery was supplied for the completion of the construction of the vessel, and such vessel was not then *completed for the purpose for which she was intended.* The court says:
>
> 'When the vessel is completed for the purpose intended, then the vessel is "built", and not till then, whether it be a steamer, a sailing vessel, a barge, a scow, or a mere float designed to support and transport a bath house; *and whatever is supplied to such a vessel for the purpose of making it what it was intended to be, and to enable it to enter upon the kind of business or navigation intended, is a part of the "building" of the vessel.'*
>
> "Tried by this criterion, the work and labor and materials furnished in this case were for the building of the vessel."

In the Winnebago, 205 U. S. 354, at page 362 (1907) the court says (italics ours):

> "It is next objected that the court erred because *certain items* were allowed for *material furnished* the vessel *after she was launched,* and therefore the subject of exclusive jurisdiction for which a lien could only be enforced in the admiralty. But

we agree with the state court that *these items were really furnished for the completion of the vessel and were fairly a part of her original construction.* In such a case the remedy was within the jurisdiction of the state court. The Isosco, Fed. Cas. 7060; The Victorian, 24 Oregon, 121; The Winnebago, 73 C. C. A. 295;" (205 U. S. 362).

* * * * * * * *

The United Shores (Dist. Ct. W. D. N. Y. 1912), 193 Fed. 552.

That was a proceeding *in rem* against the passenger steamer United Shores to enforce a lien for the purchase price of certain lifeboats, life rafts, life preservers, and releasing hooks for life boats. After the steamer was launched, the materials were shipped and delivered to her; it was claimed by the libellants that while the articles furnished were necessary by law, that they were no part of the actual construction of the vessel as were her engines, hull, boiler, etc., and that they were not essential to the completion of the vessel, as that term is commonly understood, and that, therefore, a maritime lien existed therefor.

But the court said (italics ours):

"But I think that such articles were a part of her original equipment and essential to her completion. She was not a fully equipped or completed vessel without them, since her practicability, or at least her right to navigate and carry passengers, required that she be provided with such life-saving apparatus *to fit her for her intended pur-*

pose. American & English Encyc. of Law, Vol. 19, p. 1902; Benedict's Admiralty (4th Ed.) S. 183. Without it she was an incompleted vessel and outside of the admiralty jurisdiction of this court, Roach *et al.* v. Chapman *et al.,* 22 How. 129, 16 L. Ed. 294; Edwards v. Elliott *et al.,* 21 Wall, 532, 22 L. Ed. 487; *In re* Glenmont (D. C.) 32 Fed. 703. And it is *not of material importance that the supplies were furnished by the libellants subsequent to launching the steamer.* The Winnebago, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836; The Paradox (D. C.) 61 Fed. 860.

"In the Glenmont, *supra,* articles such as *tiller lines, fuel, copper wire, deck line, bedding, etc., were furnished to enable a vessel to proceed on her voyage,* and the question arose whether a maritime lien or contract existed for the sale of such articles. The court held substantially that the single question was whether such supplies or materials *were part of the original contract to build the vessel and make her 'serviceable for the navigation* contemplated' and as the original construction of the boat contemplated as such all the materials mentioned, no maritime lien existed, and the federal court was without jurisdiction. *That this rule has been universally recognized and followed the cases already cited show.* So, in this case, it was necessary that the United Shores should have aboard the articles furnished by libellants to *make her serviceable for the purpose for which* she was built." (193 Fed. 553-4.)

* * * * * * * *

Thames Towboat Company v. The Schooner Francis McDonald, 254 U. S. 244. (Italics ours.)

The Supreme Court had the following question before it for final decision: "Is appellant's contract to furnish the materials, work and labor for her completion made after the schooner was launched, *but while yet not sufficiently advanced to discharge the functions for which it was intended within the Admiralty and maritime jurisdiction?*" The District Court thought not and so do we. In arriving at this conclusion the Supreme Court held the following cases entitled to the greater weight:

The Isosco, 1 Brown, Adm. 495, Fed. Cas. No. 7.060;

The Pacific, 5 Hughes, 257, 9 Fed. 120;

The Count de Lesseps, 17 Fed. 460;

The Glenmont, 32 Fed. 703 and 34 Fed. 403;

The Paradox, 61 Fed. 860;

McMaster v. One Dredge, 95 Fed. 832;

The United Shores, 193 Fed. 552;

The Dredge A, 217 Fed. 617;

The Winnebago, 205 U. S. 354, 363, 51 L. Ed. 836, 841 27 Sup. Ct. Rep. 509;

North Pacific S. S. Co. v. Hall Bros., Marine R. & Shipbuilding Co., 249 U. S. 119, 125, 63 L. Ed. 510, 512, 39 Sup. Ct. Rep. 221."

From the foregoing authorities it is apparent that the important and controlling fact to be determined is: was the "Mountaineer" when she left Tacoma without her purse seine, suitably equipped for the navigation and purpose for which she was designed and intended. That she was intended for purse seine fishing is not questioned by appellant's counsel, nor do they even intimate that a purse seine was not necessary to enable her to function as intended. The basis of their argument is: she was able to navigate the seas,—but this is not the criterion by which to try this case. Throughout appellant's brief, they have perforce quoted the true criterion. We will quote from their brief (p. 12): "the fact that the vessel is launched does not make it a complete thing, but that she must be able to carry on the navigation intended before she becomes a complete ship." (Thames Towboat Co. v. Schooner Francis McDonald, 254 U. S. 244.)

(P. 13): "And we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended." (Thames Towboat Co. v. Schooner Francis McDonald.)

(Pp. 15-16): "until in other words she becomes a complete ship capable of all navigation for her intended use and is ready for service."

(P. 23): "The Supreme Court in its decision requires that a contract in order to be non-maritime

must be both for construction and necessary to bring the vessel into a condition to function as intended. All decisions regarding original equipment go off upon the point either that the original equipment furnished was a part of the original ship building contract or that the particular vessel in question could not navigate for the purpose intended without that equipment."

In conclusion, we would like to invite attention to Honorable Benjamin F. Bledsoe's Memorandum Opinion [Tr. pp. 40-44] confirming the special master's report. We further invite attention to the fact that a bond staying execution has been filed, that the vessel is still in custody and that regardless of whatever decree may be rendered by this court or on mandate of this court by the court below the proceeds from the sale will not now be sufficient to satisfy all claims, and that unless a decree be rendered for such deficiency against the surety on its stay of execution these liens cannot be fully satisfied.

We submit that under the clear weight of authority the purse seine furnished to the "Mountaineer" was a part of her original equipment for which no maritime lien exists.

Respectfully submitted,

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